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Nos. 89-1633 and 89-1634

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

On Appeals From The United States
District Courts For The District Of Columbia
And The Western District Of Washington

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Whether the Flag Protection Act of 1989, as applied to the expressive burning of a flag in an overtly political demonstration, violates the First Amendment to the United States Constitution.

2. Whether the Flag Protection Act of 1989 on its face violates the First Amendment to the United States Constitution.

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MISCELLANEOUS

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STATEMENT OF THE CASE

Introduction

The United States seeks to do in these cases precisely what this Court barred the State of Texas from doing in *Texas v. Johnson*, 109 S. Ct. 2533, 2547 (1989): "criminally

punish a person for burning a flag as a means of political protest." The criminal statute invoked is worded differently, but the governing legal principle is the same: the government may persuade and encourage people to respect the flag, but it may not compel the appearance of respect by penalizing flagburning. *Id.*

The lesson of *Johnson* is so clear that before these cases the United States conceded the point. The Administration testified in Congress that "[i]n the face of the Court's holdings in *Texas v. Johnson* and *Spence v. Washington*, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional."[1] To permit the government to incarcerate individuals merely for expressing opposition to its most political symbol would have grave consequences for the meaning of freedom of expression. This Court should reaffirm the principles articulated so recently in *Johnson*, and affirm the district courts' judgments.

Statement of Facts

A. The Demonstrations

These consolidated appeals arise out of similar political demonstrations in Washington, D.C., and Seattle,

[1] *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 183 (1989) ("House Hearings") (Written Testimony of Assistant Attorney General William Barr, Office of Legal Counsel).

Washington. Both cases were resolved on motions to dismiss on the basis of undisputed facts.

1. *United States v. Eichman*

On October 30, 1989, defendants in *Eichman*, together with Gregory Johnson, the defendant in *Texas v. Johnson*, burned United States flags on the steps of the United States Capitol as part of a political demonstration. Defendants arrived at the Capitol with a large contingent of news media, and circulated a written statement signed by all four flagburners. J.A. 43-45. The circulated statement explained that the flagburning was undertaken to protest a broad array of United States policies, and to oppose the Act's "compulsory patriotism" in light of such policies. J.A. 55-57.[2]

Defendants subsequently submitted declarations further explaining their intent in burning the flags. David Blalock, a veteran of the Vietnam War, explains that his service in Vietnam led him to associate the flag with United States intervention abroad, and that he burned the flag in opposition to such intervention. J.A. 50-54. Shawn Eichman, a New York artist, burned the flag to protest the United States' oppression of women and exploitation abroad. J.A. 46-49. Scott Tyler, a.k.a. "Dread Scott," a Chicago-based "revolutionary artist," burned the flag in

[2] The police arrested the three defendants and Mr. Johnson, and initially charged all four with disorderly conduct, demonstrating without a permit, and violating the Flag Protection Act of 1989. J.A. 43. The United States Attorney ultimately decided, however, to file informations only under the Flag Protection Act, and decided not to charge Mr. Johnson. J.A. 68.

part to protest the United States' oppression of Black people, and in part as a response to reactions to his art exhibit, "What is the Proper Way to Display a U.S. Flag?" J.A. 58-67. Mr. Tyler's art exhibit caused a political uproar when it was displayed at the School of the Art Institute of Chicago in February 1989, *id.*, and eventually caused Congress to add the clause in the current Act criminalizing "maintain[ing the flag] on the floor or ground." *See infra* note 37. The fourth flagburner, Gregory Johnson, burned the flag "to express unity with . . . oppressed people throughout the world." J.A. 68-71. These statements underscore that defendants burned flags out of deeply-held convictions founded upon their personal experiences.

Defendants consider flagburning an essential element of their political expression, because for them, the flag represents not glory but oppression. Mr. Blalock, for example, states that "burning the Flag is a vital and indispensable means by which to communicate [his] message," because it is "a dramatic and total rejection of forced patriotism and the corruption that it conceals," and is "clearly understood by all the world's people." J.A. 53.

2. *United States v. Haggerty*

Early on the morning of October 28, 1989, minutes after the Flag Protection Act of 1989 took effect, defendants in *Haggerty* burned United States flags in a political demonstration in front of a Post Office in downtown Seattle. J.A. 74-84. A leaflet circulated in connection with the demonstration argued that "[b]lind patriotism must

not be the law of the land," that "[b]urning a flag is more of a symbol of freedom than the flag itself," and that the Flag Protection Act was "an attack on political protest and dissent." J.A. 79. The government accused defendants in *Haggerty* of burning a flag owned by the United States Postal Service. J.A. 35.

As in *Eichman*, defendants in *Haggerty* submitted declarations further explaining their intent in burning flags. Carlos Garza, a Mexican-American, burned flags "to express [his] outrage over the mistreatment of Hispanic Americans by our government." J.A. 83. Jennifer Campbell, a student at the University of Washington, did so "to strip off this blindfold of unquestioning allegiance and to cause people to focus on the suffering of people, both at home and abroad, and to thereby move America closer towards everything it is supposed to be." J.A. 77. Mark Haggerty participated because "[t]he U.S. flag stands not for the people of the U.S. but for the power of the super-rich ruling class as expressed through their government." J.A. 75. And Darius Strong sought to "communicat[e] the idea that a person's freedom to express an opinion critical of the Government is of greater legal and moral value in America than the Government's authority to criminalize acts constituting demonstrations of . . . individual beliefs." J.A. 81.

B. The Flag Protection Act Of 1989

The United States charged all defendants under the Flag Protection Act of 1989 (Act), Pub. L. No. 101-131, 103

Stat. 777 (amending 18 U.S.C. § 700).[3] The Flag Protection Act reflects Congress's attempt to continue to criminalize flagburning and other specified flag conduct in the wake of *Texas v. Johnson*. Congress understood that the Court's decision in *Johnson* implicitly invalidated the existing federal flag statute, and therefore sought to amend the flag statute to ensure that flagburning would remain a criminal act. S. Rep. No. 152, 101st Cong., 1st Sess. 9 (1989) (acknowledging "fatal flaw . . . in the existing Federal statute").

Prior to its amendment, 18 U.S.C. § 700 prohibited "knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."[4] In amending the statute, Congress removed the requirements that the actor "knowingly cast contempt" by a "public" act. It modified "defiling" to "physically defil[ing]," and added a proscription against "maintain[ing the flag] on the floor or ground."

As amended, the Flag Protection Act of 1989 provides that "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year,

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[3] The government also charged the *Haggerty* defendants with destroying government property, under 18 U.S.C. § 1361-62, J.A. 34, but defendants do not challenge the constitutionality of that statute. Defendants have not admitted burning government property, nor has this charge been proven.

[4] Pub. L. No. 90-381, 82 Stat. 291 (1968) (codified at 18 U.S.C. § 700) (1988) (amended 1989)).

or both." 18 U.S.C. § 700(a)(1). The amended statute includes an express exception, however, for some flagburning: the Act "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." 18 U.S.C. § 700(a)(2).[5] The statute defines "flag of the United States" as "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." 18 U.S.C. § 700(b).[6]

C. The District Court Decisions

In both cases, defendants moved to dismiss the charges against them prior to trial on the grounds that the Act is unconstitutional on its face and as applied to their conduct. Both district courts followed *Johnson* and ruled that the Flag Protection Act is unconstitutional as applied to defendants' politically expressive flagburnings.

The courts first determined that defendants' conduct was sufficiently expressive to raise First Amendment

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[5] The House Report states that the disposal exception was added in response to "the apprehension that the statute would 'make criminals out of every member of a veterans' post that has a ceremonial burning of a worn-out flag on Memorial Day,' " and " 'would have the odd result of prosecuting veterans who destroy the flag, whom we really don't want to prosecute.' " H.R. Rep. No. 231, 101st Cong., 1st Sess. 9 (1989).

[6] Neither the Act nor the legislative history define what forms of the flag are "commonly displayed," although the House Report states that some of the most commonly displayed forms are *not* covered, such as flags depicted on coffee cups and in newspapers, and "commercial and political uses of the flag." H.R. Rep. No. 101-231, *supra* at 11 and n.12.

concerns, a point no party disputed. *Haggerty* J.S. App. 5a; *Eichman* J.S. App. 9a-10a. Each court then concluded, as did this Court in *Johnson*, that strict First Amendment scrutiny should be applied, because the governmental interest in prohibiting flagburning – to preserve the flag's value as a symbol of the nation – is "related to the suppression of free expression." *Haggerty* J.S. App. 10a; *Eichman* J.S. App. 11a; *Johnson*, 109 S. Ct. at 2542. Accordingly, both courts found, the more lenient standard of First Amendment review articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), is inapplicable, and the government must advance a compelling state interest to justify its prosecution. *Haggerty* J.S. App. 6a-13a; *Eichman* J.S. App. 11a.

The only interest Congress identified in enacting the Flag Protection Act was to preserve the flag's symbolic value, the precise interest this Court found insufficient in *Johnson*. *Haggerty* J.S. App. 13a-15a; *Eichman* J.S. App. 15a-17a; *Johnson*, 109 S. Ct. at 2547. In its amicus brief, counsel for the House Leadership also articulated an interest in the flag as an "incident of sovereignty," but both courts found that interest analytically indistinguishable from the interest in the flag's symbolic value. *Haggerty* J.S. App. 12a-13a; *Eichman* J.S. App. 14a-15a. Therefore, both courts concluded that the asserted governmental interests did not justify criminally punishing respondents for their politically motivated flagburnings. *Haggerty* J.S. App. 13a-15a; *Eichman* J.S. App. 15a-17a.

SUMMARY OF ARGUMENT

The United States flag was born of a "desecration." When George Washington took command of the Continental Army at Cambridge, Massachusetts in 1776, he defaced a British flag by ordering sewn upon it thirteen red and white stripes, subsequently referred to as "The Thirteen Rebellious Stripes."[7] The question before this Court is whether the United States government may incarcerate its citizens for engaging in similar politically expressive flag desecration.

I. The Court answered this question last term in *Texas v. Johnson*, 109 S. Ct. 2533. *Johnson* established that the government may not criminalize flagburning to preserve the flag's symbolic value. A law so designed provokes stringent First Amendment scrutiny because it is necessarily directed at the communicative content of the proscribed flag conduct. And the government's interest in the symbolic value of the flag is insufficiently compelling to justify criminal punishment of politically expressive conduct. *Johnson* reaffirmed what this Court held forty-seven years ago in *West Virginia Board of Education v.*

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[7] Hart, *The Story of the American Flag*, 58 Am. L. Rev. 161, 167 (1924); *see also President's Proclamation Commemorating Flag Day and National Flag Week 1980*, 1 Pub. Papers 895 (May 12, 1980). Similarly, Pennsylvania's first flag consisted of a serpent superimposed on a British flag, "coiled, ready to strike, its head and fangs directed toward the English ensign above." 58 Am. L. Rev. at 171. The tradition of flag desecration continues to this day. In 1989, when the people of Romania, Yugoslavia, and East Germany rose up in protest against their respective governments, they carried national flags "desecrated" by excised centers.

Barnette, 319 U.S. 624, 640-42 (1943): the dual principles of freedom of expression and government by the people prohibit the State from mandating respect for its icons by imprisoning those who express disrespect. These principles compel dismissal of the prosecutions at issue here.

Congressional amici argue that the Flag Protection Act of 1989 is designed to "protect the physical integrity of the flag in all circumstances," and therefore should be treated differently from the Texas statute. But the Act is not so designed: it permits conduct that would imperil the flag's physical integrity, such as flying it in a storm, and it proscribes conduct that will have no effect on a flag's physical integrity, such as maintaining it on the floor or temporarily attaching a peace symbol to it.

More fundamentally, because "the flag" is not a physical object but an infinitely reproducible symbol, the only conceivable interest for protecting the flag's "physical integrity" is to preserve its symbolic value. And that interest, the Court has already held, cannot justify criminally punishing flagburning.

Nor can the Act be upheld as a restriction on the "manner" of expression, because it is content- and viewpoint-based. It singles out a particular politically charged symbol for "protection"; it proscribes only that flag conduct traditionally associated with dissent; it prohibits "physically defil[ing]" flags, an inherently viewpoint-based term; and while forbidding most "burning," it permits the burning of flags for disposal, the only flagburning deemed respectful under the Flag Code, 36 U.S.C. § 176(k).

II. The United States explicitly asks the Court to "reconsider" *Johnson*, but it implicitly asks the Court to reconsider the core principle of the First Amendment: that government may not prohibit political expression merely because it finds it offensive. The United States would have the Court rule that flagburning is unprotected expression because the government finds it an offensive and unimportant form of expression. But the First Amendment is needed precisely for expression that offends the government. The United States' proposed "exception" would swallow the rule of freedom of expression.

III. Finally, the Act is unconstitutional on its face. In addition to being content- and viewpoint-based, it is vague and substantially overbroad. It is impossible to discern which "flags" are covered by its proscriptions, or when a flag has become sufficiently "worn or soiled" to be open to desecration. And it forbids virtually all flag conduct associated with dissent.

ARGUMENT

I. THE FLAG PROTECTION ACT IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS' POLITICALLY EXPRESSIVE CONDUCT

Texas v. Johnson controls these cases. It sets forth the appropriate legal analysis for defendants' as applied challenge, and requires that the Flag Protection Act of 1989 be declared unconstitutional as applied to defendants' politically expressive flagburnings. The analysis is straightforward: (1) defendants' conduct is expressive,

thereby raising First Amendment concerns; (2) the government's interest in regulating flagburning – to protect the flag's symbolic value – is by definition related to the suppression of expression, and therefore stringent First Amendment scrutiny applies; and (3) the government's symbolic interests are not sufficiently compelling to justify incarcerating political protesters for expressive conduct.

A. DEFENDANTS' BURNING OF THE FLAG AS PART OF AN OVERTLY POLITICAL DEMONSTRATION IS EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT

The Court "must first determine whether [defendants'] burning of the flag constituted expressive conduct, permitting [them] to invoke the First Amendment." *Johnson*, 109 S. Ct. at 2538; *Spence v. Washington*, 418 U.S. 405, 409-10 (1974). No one disputes that defendants' flagburnings were sufficiently expressive to raise First Amendment concerns. U.S. Br. at 22; Sen. Biden Br. at 8.[8] Because "[t]he very purpose of a national flag is to serve as a symbol of our country," this Court has "had little difficulty identifying an expressive element in conduct relating to flags." *Johnson*, 109 S. Ct. at 2539. Thus, the first step in the *Johnson* analysis is satisfied.

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[8] The flagburnings at issue here, as in *Johnson*, took place during overtly political demonstrations. Both demonstrations were announced in advance and widely reported. Written statements issued in connection with the flagburnings explained their political purpose. J.A. 55-57, 79. Defendants' declarations, summarized in the Statement of Facts, *supra*, further underscore the communicative intent of their actions.

B. STRICT FIRST AMENDMENT SCRUTINY APPLIES BECAUSE THE GOVERNMENT'S INTEREST IN PROTECTING THE FLAG IS RELATED TO THE SUPPRESSION OF EXPRESSION

One of two levels of First Amendment scrutiny applies where, as here, the government seeks to punish expressive conduct. The level of scrutiny turns on the nature of the government's reason for regulating the conduct. If Congress's interest in prohibiting particular flag conduct is related to the conduct's expressive content, the Act is indistinguishable from a restriction addressed to speech itself, and traditional strict First Amendment scrutiny applies.[9] A less stringent standard, set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), applies only if Congress's reason for prohibiting the conduct is "wholly unrelated" to its expressive content. *Buckley v. Valeo*, 424 U.S. 1, 17 (1976); *Johnson*, 109 S. Ct. at 2540-41.

Johnson squarely holds that an interest in "preserving the flag as a symbol of nationhood and national unity" "is related to expression in the case of . . . burning of the flag." *Johnson*, 109 S. Ct. at 2542. This is because the flag's symbolic value can be impaired, if at all, only to the extent that conduct expresses some message of disrespect for the flag. *Id*. The government's concern that the flag's symbolic meaning will be harmed "blossom[s] only when

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[9] *Johnson*, 109 S. Ct. at 2540-41; *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom, Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

a person's treatment of the flag communicates some message, and thus [is] related 'to the suppression of free expression' within the meaning of *O'Brien*." *Id.* at 2542; *Spence*, 418 U.S. at 414 n.8.

All parties have conceded that the Act's purpose is to protect the flag's symbolic value as an emblem of nationhood, the same interest Texas asserted in *Johnson*. The United States represents that the "interest – expressly identified by both the Congress and the President – that lies at the core of the statute [is] the preservation of the flag as the unique symbol of our Nation." U.S. Br. at 29. The Senate similarly concedes that "the government's interest [is] in preserving the flag as a national symbol." Sen. Br. at 5.[10] While the House Leadership attempts to construct a distinct "sovereignty" interest, *see infra* Section I.C.3, it has also conceded that Congress's interest was in protecting the flag "as a symbol of the nation and guarantor of rights."[11]

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[10] In the district court, the Senate also asserted, without a trace of irony, that the Act was designed "to serve notice that anyone may speak his or her mind under the protection of the flag." Memorandum of United States Senate as *Amicus Curiae*, *United States v. Eichman*, (Cr. Nos. 89-419/420/421 filed Jan. 12, 1990), at 33; *see also id.* at 31 (flag should be protected because it is "the symbol and the guardian of dissent").

[11] Memorandum of the Speaker and Leadership Group of the U.S. House of Representatives in Opposition to Defendants' Motion to Dismiss, *United States v. Eichman* (Cr. Nos. 89-419/420/421 filed Jan. 12, 1990), at 3 n.3. The asserted interest in protecting the flag as "an incident of sovereignty" is equally related to the suppression of expression. As the House Leadership brief demonstrates, the flag is an "incident of sovereignty" precisely for its communicative value. Br. at 25-36.

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Indeed, because "the flag" is not a physical object but a non-corporeal symbol, the *only* interest the government could have in protecting each of the symbol's infinite material representations is a symbolic one. Thus, the United States maintained in district court that "this interest in protecting the symbolic value of the Flag is the only conceivable interest the government has in protecting the physical integrity of the flag."[12]

The Act's legislative history underscores Congress's interest in protecting the flag's symbolic value. The Senate Report explains that the Act "is intended to protect the flag because of what it expresses and represents." S.

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Thus, an interest in the flag as an "incident of sovereignty" can only be harmed, if at all, by flag conduct that communicates a message inconsistent with the government's chosen meaning for the flag.

[12] Government's Memorandum in Opposition to Motion to Dismiss, *United States v. Eichman*, (Cr. Nos. 89-419/420/421 filed Jan. 12, 1990), at 15; *Hearings on Measures to Protect the Physical Integrity of the Flag: Hearings Before the Senate Comm. on the Judiciary*, ("Senate Hearings"), 101st Cong., 1st Sess. 118 (1989) (Letter of Attorney General Richard Thornburgh). As Justice Brennan stated in *Kime v. United States*, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting from denial of certiorari) (emphasis added):

> [t]he Government has no aesthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake; the *only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol*. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Rep. No. 101-152, *supra*, at 5.[13] The House Report states that the Act "recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object." H.R. Rep. No. 101-231, *supra* at 9. In an additional statement by several committee members who voted for the statute, the House Report states:

> No flag protection statute would, or ever could, be justified by anything other than the Government's interest in protecting the symbolic value of the flag. Any claim to the contrary would plainly be pretext and would be recognized as such by any court.

Id. at 17-18 (Additional Views of Congressman Sensenbrenner *et al.*).[14]

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[13] According to the Senate Report, the flag should be protected because it is a "unique and unalloyed symbol of the Nation," S. Rep. No. 101-152, *supra*, at 3, which reflects " 'all the rights and freedoms guaranteed under our Constitution,' " *id.*, " 'our Nation's precious heritage,' " *id.* at 2, and "the spirit of our democracy." *Id.* at 5.

Senators Hatch and Grassley, who opposed the statute because they felt it would be unconstitutional, stated without response from the majority report that:

> it cannot be denied that the principal if not the only purpose in enacting a facially neutral statute is to prohibit expressive conduct that physically desecrates the flag. No one claims that we are interested in protecting the material, the thread, and the dye in the flag. We protect the flag as a symbol . . .

Id. at 24 (Minority Views of Hatch and Grassley).

[14] To a person, the Act's sponsors and supporters on the floor of Congress reiterated their interest in guarding the flag's

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Thus, Congress's interest in regulating flag conduct arises from its concern for the flag's symbolic value. As this Court held in *Johnson*, because such an interest is related to the suppression of expression, the lenient *O'Brien* standard is inapplicable, and Congress must advance a compelling interest to justify the Act. *Johnson*, 109 S. Ct. at 2542.[15]

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symbolic value from expressive acts that they find offensive. *See* Amicus Curiae Brief of Authors' League of America et al., at Section I.B.1.a. (collecting statements from Congressional Record). Senator Biden argues that the individual motives of legislators are irrelevant to determining Congress's purpose in enacting a statute. Sen. Biden Br. at 16-19. Here, however, the legislative history underscores the purpose that is evident on the face of the statute and that all branches of government acknowledge.

[15] The House Leadership argues that because the Act is worded neutrally, *O'Brien* should apply. Both the premise and logic of this argument are flawed. First, the Act is not worded neutrally. *See* Section I.D *infra*. Second, it is the government's "interest" in regulating that renders *O'Brien* inapplicable. Thus, the Court in *Johnson* concluded that *O'Brien* was inapplicable *before* it turned to the face of the statute. 109 S. Ct. at 2542. Similarly, in *Spence*, the Court concluded, *without reference to the statute's terms*, that *O'Brien* was inapplicable because the government's "interest" in protecting the flag as a national symbol "is directly related to expression." *Spence*, 418 U.S. at 414 n.8. The statute in *Spence* was at least as "neutral" as the Flag Protection Act of 1989. It did not single out actions that cast contempt or seriously offend, and applied equally to a veteran respectfully placing his or her medals on the flag and to Mr. Spence's affixing a peace symbol. *Spence*, 418 U.S. at 414 n.9.

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C. THE GOVERNMENT'S ASSERTED INTERESTS ARE NOT SUFFICIENTLY COMPELLING TO JUSTIFY CRIMINALLY PUNISHING FLAGBURNING

The United States and congressional amici assert three interests to justify the Act: (1) preserving the flag's symbolic value; (2) preserving the flag's "physical integrity"; and (3) preserving the flag's function as an "incident of sovereignty." None of these interests is sufficiently compelling to justify incarcerating an individual for burning a flag in political protest.[16]

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That a purpose to suppress expression will render even a facially neutral statute subject to strict First Amendment scrutiny is also demonstrated by *Buckley v. Valeo*, 424 U.S. at 17. In that case, the Court applied strict First Amendment scrutiny to campaign finance restrictions that "d[id] not focus on the ideas expressed by persons or groups," because the government's interest in the restrictions – to neutralize the impact of wealth on election campaigns – "involve[d] 'suppressing communication.' " *Id.*

The dearth of support for the House Leadership's position is underscored by its heavy reliance on *United States v. Cary*, No. 88-5458, Slip op. (8th Cir. Feb. 26, 1990), a decision upholding the constitutionality of applying the 1968 federal flag statute to a flagburning that caused a breach of the peace. H.R. Br. at 17-20. Leaving aside whether a statute that is unconstitutional on its face can nonetheless be constitutionally applied, *Cary* is easily distinguishable, as no one has even hinted that a "breach of the peace" interest underlies the 1989 Act, much less either of the cases before the Court.

[16] Significantly, no party, nor any member of Congress, stated that the government's interest is in protecting its *own*

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1. Preserving The Flag's Symbolic Value

In *Johnson*, this Court held that the government's interest in preserving the flag as a national symbol is insufficiently compelling to justify a prosecution for political flagburning. *Johnson*, 109 S. Ct. at 2543-48. While that interest allows the government to encourage people to respect the flag, it does not permit the government to compel people to show that respect under penalty of imprisonment. *Id.* at 2545. The same conclusion must be drawn here.

The United States argues that notwithstanding *Johnson*, this interest should now be found sufficient, because Congress has made a "considered legislative judgment" that it is compelling. U.S. Br. at 25-27.[17] Passage of the

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flags. As the *Haggerty* case demonstrates, the government already has a means for protecting damage to its own property, whether it be a flag, a national monument, or an office stapler. 18 U.S.C. § 1361-62. These statutes are a less restrictive means of protecting the government's property interests, because they do not single out property with a particular symbolic content. *Cf. Boos v. Barry*, 108 S. Ct. 1157, 1166 (1988). Moreover, as the United States admits, the Flag Protection Act cannot be limited in its application to government-owned flags. U.S. Br. at 29-30 n.24. Thus, the fact that defendants in *Haggerty* are charged with burning a Post Office flag does not alter the constitutional analysis. *Id.*

[17] In fact, none of the congressional amici claims that Congress's enactment of the Act establishes a compelling state interest. Instead, they urge application of a lenient standard of review, effectively conceding that their interests are not compelling.

Act, in its view, demonstrates a "national consensus . . . that physical destruction of the American flag . . . constitutes a violent assault on the shared values that bind our national community." *Id.* at 27. This Court has rejected such self-justifying arguments in the First Amendment context:

> '[d]eference to a legislative finding cannot limit judicial inquiry where First Amendment rights are at stake . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.'

FCC v. League of Women Voters, 468 U.S. 364, 387 n.18 (1984) (*quoting Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)). The First Amendment was designed precisely to ensure that the majority not impose its notions of "consensus" on those who disagree.[18] *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, [and] to place them beyond the reach of majorities and officials"). The United States' view would leave the Bill of Rights to the whims of legislators.

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[18] In holding hearings on flag desecration, Congress expressly declined to hear oral testimony from anyone who, like defendants here, affirmatively believed that flagburning is an important means of political expression. *See* House Hearings, *supra* at 472 (Written Testimony of Emergency Committee on the Supreme Court Flag-Burning Case). Thus, the alleged "consensus" on this issue had to be artificially constructed in the legislative record by excluding opposing views. It is also worth noting that with one exception, all of the amici supporting the Act are government bodies or officials.

If the flag is to symbolize " 'all the rights and freedoms guaranteed under our Constitution,'" S. Rep. No. 101-152, *supra*, at 3, people must be as free to destroy it as they are to wave it. *Haggerty* J.S. App. 16a. And if Congress wants people to respect the flag, that goal is undermined, not furthered, by a law punishing acts of disrespect. True respect requires the freedom to choose whether to pay respect. Finally, the flag is an infinitely reproducible symbol, and there is no showing that burning, temporarily defiling, or laying on the floor one or more of its representations harms its continuing function as a symbol. "[U]ndifferentiated fear . . . is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503, 508 (1969).

2. Preserving The "Physical Integrity" Of Flags

The congressional amici contend that the Act should be upheld because it is aimed at protecting "the physical integrity of the flag in all circumstances." Sen. Br. at 27-28; H.R. Br. at 11-17; Sen. Biden Br. at 26-27. This argument, based on dicta in *Johnson*, 109 S. Ct. at 2543, and a dissent by Justice Blackmun in *Smith v. Goguen*, 415 U.S. 566, 590-91 (1974) (Blackmun, J., dissenting), fails for two reasons.

First, the Act is not "aimed at protecting the physical integrity of the flag in all circumstances," for the same reason that this Court found that the Texas statute in *Johnson* was not so aimed: it contains an exception for the

burning and physical destruction of worn or soiled flags. *Johnson*, 109 S. Ct. at 2543. As the Court stated:

> If [Johnson] had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag 'when it is in such condition that it is no longer a fitting emblem for display,' and Texas has no quarrel with this means of disposal. *The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances*, but is designed instead to protect it only against impairments that would cause serious offense to others.

Id. (emphasis supplied). Significantly, the Massachusetts statute Justice Blackmun voted to uphold in *Smith v. Goguen* contained no such disposal exception. *Goguen*, 415 U.S. at 569 n.3 (quoting Massachusetts flag statute).

The Act is both underinclusive and overinclusive with respect to a flag's "physical integrity."[19] One may not lay the flag on the floor even under a glass covering that will preserve it from all physical harm whatsoever. Yet one may wave the flag where its physical integrity will be greatly endangered, as in bad weather or battle.[20]

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[19] *See FCC v. League of Women Voters*, 468 U.S. at 396 ("The patent overinclusiveness and underinclusiveness of [a statute] 'undermines the likelihood of a genuine [governmental] interest.' ") (*quoting First National Bank v. Bellotti*, 435 U.S. 765, 793 (1978)).

[20] Senator Biden tries to distinguish such conduct on the ground that one who exposes a flag to danger has not "*acted* to harm the flag." Sen. Biden Br. at 13 n.3 (original emphasis). But

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The Act prohibits conduct that temporarily "defiles" or "defaces" the flag, without any lasting injury to the flag's physical integrity.[21] A person can be convicted for throwing dirt on her privately owned flag even if she immediately washes it off and no harm is done to the flag's physical integrity. Thus, the statute is not aimed at protecting the flag's physical integrity in all circumstances.[22]

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surely deciding to fly a flag in the heart of a storm constitutes "action" as much as maintaining the flag on the floor. The House Leadership protests that "neither weather nor the gunfire of an enemy . . . are susceptible to statutory control." H.R. Br. at 8 n.10. But weather and gunfire will do a flag no harm unless a human being affirmatively exposes the flag to such dangers in the first place.

[21] As examples of acts that "physically defile," Senator Wilson, who introduced this clause, referred to tossing dirt or wiping soluble grease on the flag, both of which, he postulated, could be cleaned off, thereby having no effect on the flag's physical integrity. 135 Cong. Rec. S12616 (daily ed. Oct. 4, 1989). Senator Biden responded that the amendment was unnecessary because the prohibition on "defacing" already covered temporary dirtying of a flag that does no permanent harm. *Id.* at S12617. Yet Senator Biden's amicus brief repeatedly states that the Act does not prohibit temporary harm to the flag. Sen. Biden Br. at 11-13. Such ephemeral "harm" to the flag is the precise type of conduct the Court protected in *Spence v. Washington*, 418 U.S. at 415.

[22] Even if the Act were so designed, that would not justify its *application* to a politically expressive act of flagburning. Justice Blackmun's dissent in *Smith v. Goguen* was addressed solely to the *facial* validity of the statute. Goguen made no showing that the flag patch had a communicative purpose. 415 U.S. at 568 and n.1 (Goguen was "not engaged in any demonstration or other protest," and there was no record of Goguen's

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Second, and more fundamentally, there is an inherent flaw in the "physical integrity" logic: there is no reason for protecting the "physical integrity" of reproductions of the flag other than preserving the flag's symbolic value. "The flag" is not a physical thing, but a symbol, and therefore the *only* interest the government has in "protect ing" it is symbolic. *See* Section I.B., *supra*.[23] Under *Johnson*,

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"purpose in wearing a flag on the seat of his trousers"); *id.* at 590 (Blackmun, J., concurring) (characterizing Goguen's act as nothing more than an "immature antic"). Justice Blackmun's dissent therefore does not apply to conduct that seeks to communicate a political message. Defendants believe that any prosecution of flag "misuse," even absent evidence of communicative intent, violates the First Amendment, because the government's interest in prosecuting would still be to preserve the flag's symbolic value. However, as in *Johnson*, the Court need not reach this question. *Johnson*, 109 S. Ct. at 2538 n.3.

[23] *See* L. Tribe, *American Constitutional Law* 801-02 (2d ed. 1988) (statute directed solely at physical integrity of flag would be unconstitutional because only conceivable governmental interest would be "preserving the flag as a national symbol"). For this reason, it is irrelevant that the government may protect bald eagles, gravesites, places of worship, or national monuments. Sen. Biden Br. at 14-15. In all these examples, the government has an independent interest in regulating that is unrelated to expression: either it is protecting its own property or that of others for particular uses (gravesites, the Vietnam Memorial), or the object of regulation is rare (bald eagles). Here, the government seeks to regulate use of a symbol *solely* because of what destruction or defilement of that symbol communicates. The analogy would be more accurate if Congress sought to punish criminally anyone who destroyed or desecrated models or reproductions of bald eagles or national monuments. *See* House Hearings, *supra*, at 194-95 (Oral Testimony of Barr).

that interest triggers strict scrutiny, and by definition cannot satisfy such scrutiny. Thus, because a statute aimed at protecting the physical integrity of the flag in all circumstances is necessarily designed to suppress attacks on the flag's symbolic value, it would be unconstitutional.

The Senate Brief unwittingly demonstrates the necessary, and necessarily fatal, link between the flag's "physical integrity" and symbolic value. The Senate purports to show that flag laws have historically been designed "to protect the flag's physical integrity without regard to any message that individuals may seek to convey through their use of it." Sen. Br. at 6. But the history demonstrates precisely the opposite: the only reason Congress and the "patriotic societies"[24] have advanced for protecting the flag has been to keep its symbol " 'sacred.' " Sen. Br. at 32 (*quoting* American Flag Association, *Circular of Information* 16 (1900).[25] Thus, the very first House Report to

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[24] It is no accident that those who have lobbied hardest for flag legislation have been "patriotic organizations." In addition to the Daughters of the American Revolution and the Society of Colonial Wars noted by the Senate, the organizations that have pushed for flag legislation have included the American Legion, which is designed to "foster and perpetuate a one hundred percent Americanism," and the Ku Klux Klan, whose purposes include "to keep eternally ablaze the sacred fire of a fervent devotion to a pure Americanism." D. Manwaring, *Render Unto Caesar: The Flag Salute Controversy* 6-7 (1962).

[25] Similarly, the National Flag Committee of the Society of Colonial Wars in the State of Illinois reported that its purpose was to "secure the passage of a bill . . . to prevent the use of our national flag *and its patterns* for other than legitimate and

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propose flag legislation states that the flag "should be held a thing sacred, and to deface, disfigure, or prostitute it to the purposes of advertising should be held a crime against the nation." H.R. Rep. No. 2128, 51st Cong., 1st Sess. 1 (1890).

The American Flag Association's model statute, adopted by many states and by Congress for the District of Columbia, applied to anyone who would, *inter alia*, "publicly deface, or defy, or defile, or cast contempt, either by words or act, upon any such flag" of the United States. Sen. Br. at 13. Congress did not enact nationwide flag protection legislation until 1968, when people began to burn the flag to protest an unpopular war. The purpose underlying such statutes can hardly be said to be "without regard to any message that individuals may seek to convey through their use of [the flag]." Sen. Br. at 6. On the contrary, throughout the history of flag laws, conduct that reflects reverence for the flag, such as the flag salute, has been either permitted or compelled, while conduct that reflects disrespect has been criminally proscribed.[26]

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patriotic purposes." National Flag Committee of the Society of Colonial Wars in the State of Illinois, *The Misuse of the National Flag of the United States of America* 1 (1895) (emphasis added). The Committee maintained that "our national flag and its patterns should command reverence, respect, and legal protection from mercenary persons" because "Old Glory is too sacred a symbol to be misused by any party, creed, or faction." *Id.* at 8-9.

[26] Flag protection statutes invariably have been enforced against critics of the government. It is no coincidence that Mr. Street was protesting the government's failure to protect civil

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The fact that patriotic societies were initially sparked by partisan and commercial "desecration" rather than political flagburnings does not diminish the fact that their concern was with the message of disrespect such uses conveyed for a political symbol that they felt should be kept "sacred."[27] That is a symbolic concern, and is

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rights workers, that Mr. Spence was protesting the government's involvement in the Vietnam War, and that Mr. Johnson was protesting President Reagan's policies. The vast majority of flag prosecutions arose in the Vietnam War era, and were directed at anti-government protesters. *See* Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 Wash. U. L.Q. 193, 194 (and cases cited therein). People have been prosecuted under flag laws for saying "to hell with the flag," Prosser, *Desecration of the American Flag*, 3 Ind. Legal F. 159, 163-64 (1969); for failing to accede to a mob's demands to kiss the flag, *Ex Parte Starr*, 263 F. 145 (D. Mont. 1920); for flying the flag from an outhouse, Prosser, *supra* at 169; for refusing to salute the flag, *id.* at 174; and for exhibiting art that "dishonor[s]" the flag, *People v. Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970). *See generally* Prosser, *supra* at 160-93 (listing hundreds of prosecutions for flag desecration).

[27] Thus, the National Flag Committee of the Society of Colonial Wars in the State of Illinois cited with disapproval many instances of flag "desecration," from a father who instructed his children not to pledge allegiance to the flag, *Misuse of the National Flag, supra* at 11, to a railroad clerk who referred to the flag as a "dirty rag," *id.* at 13, to a "certain champion bicyclist [who] covers his loins when on a wheel" with a flag-patterned "breech-clout." *Id.* at 17. *See also Hearing on S.226, S.596, S.1220, and S.3504 Before the Senate Committee on Military Affairs*, 57th Cong., 1st Sess. 4 (1920) (American Flag Association lists, among common acts of flag desecration that should be addressed by legislation, an incident in which anarchists "tor[e] to shreds and stamped upon" an American flag).

inherently related to the suppression of expression in the context of statutes criminalizing "improper" flag conduct.

History confirms what logic dictates: the only conceivable interest Congress has in protecting the "physical integrity" of a non-corporeal symbol is inextricably related to maintaining its symbolic value. And that interest, this Court has held, is not sufficient to justify incarcerating people for political expression.

3. Preserving an "Incident of Sovereignty"

Apparently inspired by a misreading of a single phrase in a D.C. Circuit opinion, the House Leadership asserts another governmental interest: protecting the flag as an "incident of sovereignty."[28] House counsel devotes many pages to developing a historical basis for this alleged government interest, H.R. Br. at 20-40, presumably

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[28] *See Joyce v. United States*, 454 F.2d 971, 985 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972) (upholding constitutionality of 1968 federal flag statute). The court in *Joyce* did not advance this as the government's interest for the 1968 statute, but as a basis for Congress's Article I power to legislate in this area at all. *Id.* When the court analyzed Congress's interest for enacting the statute, it characterized it as protecting the flag's *symbolic* value. *Id.* at 988 (interest "in having a symbol to represent them as a nation").

This Court has never ruled on Congress's affirmative power to enact criminal legislation concerning the flag. While dicta in cases such as *Joyce* assumes that Congress has such power, there is no express provision authorizing such legislation in the Constitution. Thus, Congress seeks here to impose criminal punishment in an area in which it has no power to legislate.

because not a single sentence from the Act's voluminous legislative history suggests that anyone in the 1989 Congress even considered this factor. Both district courts found that counsel had constructed this "interest" after-the-fact without any support in the legislative record. *Haggerty* J.S. App. 12a; *Eichman* J.S. App. 15a.[29]

Even if this interest actually supported the Act, it would not alter the legal analysis. First, House counsel never explains how flagburning or the other proscribed conduct undermines the flag's value as an "incident of sovereignty." Does the fact that Gregory Johnson burned a flag in 1984, that defendants burned flags on the steps of Congress, or that Scott Tyler placed a flag on the floor in an art exhibit, mean that the flag no longer serves its function in demarcating geographical boundaries and identifying ships?

The history detailed by the House itself demonstrates that flagburnings do *not* undermine the flag's function as an "incident of sovereignty." The flag is as much an "incident of sovereignty" today as it ever was, notwithstanding countless instances of flagburnings and other flag "insults" over the course of its two centuries of existence. H.R. Br. at 29-38. Thus, this interest "is simply not implicated on these facts, and in that event the interest drops out of the picture." *Johnson*, 109 S. Ct. at 2539; *Spence*, 418 U.S. at 414.[30]

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[29] Significantly, the Senate's historical review of flag laws never even mentions this concern for the flag's boundary-demarcating "sovereignty" function.

[30] The House Leadership likens the "incident of sovereignty" interest to a trademark interest, H.R. Br. at 22, an

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Second, even if this interest were threatened by flag-burning, it is no more compelling than the government's interest in the flag's symbolic value. The government's interest in having a symbol to mark ships cannot justify jailing its citizens for burning reproductions of that symbol as a means of political protest.[31]

D. The Act's Application Cannot Be Upheld as a Content-Neutral Time, Place or Manner Restriction

Senator Biden maintains that the Act should be upheld as a content-neutral "time, place, or manner" restriction. Sen. Biden Br. at 9-25. The Court has recognized that this test is virtually indistinguishable from the *O'Brien*

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interest this Court discussed and rejected in *Spence*, because there, as here, "[t]here was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint." 418 U.S. at 414.

[31] The House Leadership's reliance on the Framers, H.R. Br. at 29-36, is misplaced. First, in none of the historical examples presented do the Framers express an opinion on whether a law prohibiting flagburning would be constitutional under the First Amendment. At most, the examples demonstrate the unremarkable fact that the Framers understood the meaning of flag desecration. Significantly, Congress did not pass a flag desecration law until 1917, well after the Framers could offer their opinion. If the Framers' views are relevant, the most pertinent evidence would be their views on the Sedition Act of 1789, noted by this Court in *New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964). That evidence makes clear that the Framers considered criticism of one's government, which is ultimately what flag desecration amounts to, *essential* to a constitutional democracy. *Id.*

standard,[32] and thus it should come as no surprise that the Act also fails the time, place, or manner requirements. A statute designed to protect the flag's symbolic value is by definition content-based, and therefore fails the requirement that a time, place, or manner restriction be content-neutral. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989). Moreover, the Act's facial terms are content- and viewpoint-based.

1. The Act is Content-Based Because its Purpose is to Protect the Flag's Symbolic Value

As noted above, the governmental interest underlying the Act is to preserve the flag's symbolic value. The Act thus seeks to suppress expressive conduct *because of* its communicative nature, and is by definition content-based. *Community for Creative Non-Violence v. Watt*, 703 F.2d at 622 (Scalia, J., dissenting). Government regulation of expressive activity is content-neutral only where it is " 'justified without reference to the content of the regulated speech.' " *Rock Against Racism*, 109 S. Ct. at 2754 (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. at 293); *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). "The government's purpose is the controlling consideration." *Rock Against Racism*, 109 S. Ct. at 2754. If the government's *reason* for

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[32] "[T]he four-factor standard of *United States v. O'Brien* . . . in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

enacting a statue is related to content, the statute is content-based no matter how "neutrally" it is worded.[33]

For this reason, Assistant Attorney General Barr argued, the notion that a "facially neutral" flag statute would survive constitutional review is "demonstrably wrong." House Hearings, *supra* at 179. A flag protection statute is necessarily content-based because "[t]he restrictions imposed on speech, even by a facially neutral Flag desecration statute, neither would nor ever could be justified by anything other than the Government's interest in protecting the symbolic value of the Flag." *Id.* at 181. Where, as here, the admitted interest (and the only conceivable interest) underlying the Act is related to suppressing expression, it would not matter if the statute were somehow facially neutral.

2. The Act is Facially Content-Based Because it Singles Out a Particular Political Symbol for Protection

Any attempt to single out a particular non-material symbol for "protection" is inherently content-based. *See Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. at 510-11 ("A particular symbol . . . was singled out for prohibition"); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1506-08 (1975). Senator Biden and the House Leadership argue that the fact that

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[33] *See also* L. Tribe, *American Constitutional Law* 794-95 n.4 (2d ed. 1988) (to determine whether strict or lenient First Amendment scrutiny applies, "[t]he critical inquiry is whether the state chooses to (or must) *justify* the regulation by reference to dangers that flow from an act's communicative content").

the Act does not use phrases like "cast contempt" or "seriously offend" renders it content-neutral. Sen. Biden Br. at 6, 12; H.R. Br. at 11. But if that were the case, Congress could constitutionally criminalize "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any [emblem of the Democratic party]."[34] Under Senator Biden's theory, such a statute would be a content-neutral restriction on the "manner" of expression. Sen. Biden Br. at 12-16. The House Leadership could equally argue that Congress was "neutrally 'protecting the physical integrity' " of this symbol. H.R. Br. at 9. Yet no one would dispute that such a statute would be content-based.

While the American flag may encompass a wider spectrum of political views than the symbol of the Democratic Party, it is no less politically charged. The constitutional infirmity in "protecting" the flag is the same as that posed by "protection" of any other political symbol: By singling out one symbol and one set of messages for "protection," the Act discriminates on the basis of content.[35]

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[34] Such an evolution from statutes prohibiting desecration of the national symbol to statutes prohibiting desecration of the party symbol is precisely what happened in Nazi Germany. *See* Brief for Respondent in *Texas v. Johnson*, No. 88-155 (1989) at 16 n.16 (detailing development of flag desecration statutes in Nazi Germany).

[35] The same argument would hold true for any symbol. The Court has thus already recognized the slippery slope presented by allowing the government to regulate the flag.

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3. The Act is Viewpoint-Based Because it Proscribes Only That Flag Conduct Historically Associated With Dissent and Disrespect

The Act is viewpoint-based in the scope of flag use that it permits and proscribes.[36] It prohibits those uses of the flag traditionally associated with opposition to the government, while permitting those uses of the flag associated with support of the government. People are free to wave the flag, no matter how dangerous the circumstances, but are not permitted to lay it on the ground, no matter how secure the resting place.

As Assistant Attorney General Barr testified:

> The premise of the statute is that it is neutral . . . But let us really take a look at that neutrality. It is not neutral. Where did these verbs come from? Trample, deface, lay on the ground, burn, those are not things people do when they are using the flag in a positive way normally. Why have we not included other verbs in that prohibition? A purely neutral approach to the flag would say either everyone can use it or no one can use it. These verbs were

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Johnson, 109 S. Ct. at 2546; Senate Hearings, *supra* at 67-68 (Oral Testimony of Barr). It is no answer to assert that the flag "does not represent any single idea or value," Sen. Biden Br. at 15-16, as this Court noted in *Johnson*, 109 S. Ct. at 2544 n.9. The Democratic Party's symbol does not represent a "single idea or value." In fact, one would be hard-pressed to find any symbol that represents only a single idea or value.

[36] A viewpoint-based statute regulates expression "in ways that favor some viewpoints or ideas at the expense of others," and is presumptively unconstitutional. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

> picked for a reason. They are things that people commonly do to show disrespect, deface the flag.

Senate Hearings, *supra* at 116 (Oral Testimony of Barr).

That Congress chose the prohibited forms of conduct because of their historical use in expressing dissent is perhaps best exemplified by the genesis of the clause prohibiting "maintain[ing the flag] on the floor or ground." Congress added this clause in direct response to defendant Scott Tyler's exhibit at the School of the Art Institute of Chicago, in which a flag was maintained on the floor. Because the then-existing federal flag statute did not prohibit such conduct, Senator Dole introduced an amendment to address it. That language continues in the Flag Protection Act of 1989.[37]

4. The Prohibition on "Physically Defil[ing]" the Flag Is Viewpoint-Based

The Act's prohibition on "physically defil[ing]" flags is also viewpoint-based. In the 1968 statute's legislative history, Congress expressly defined "defile" to include all acts that "dishonor" the flag, an inherently viewpoint-based term. H.R. Rep. No. 350, 90th Cong., 1st Sess. 4

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[37] Senator Dole introduced the precursor to this clause on March 16, 1989, shortly after Mr. Tyler's art exhibit opened. *See* 135 Cong. Rec. S2811 (daily ed. March 16, 1989). Senator Dixon, speaking in support of the bill, noted "[w]e have a situation in Chicago, Mr. President, where the U.S. flag has been portrayed in art in a manner that has raised the ire and offended the sensibilities of many Americans." *Id.* The Senate approved the bill 97-0. *Id.* at S2812.

(1967). Modifying this verb to cover only acts that "physically" dishonor the flag is redundant, and in no way remedies its viewpoint bias.

The 1989 Act's drafters initially removed "defile" altogether from the prior flag statute, recognizing its constitutional infirmity. *See* H.R. Rep. No. 101-231, *supra* at 8. Congress resurrected the prohibition, however, precisely to criminalize conduct that does no lasting harm to the flag's physical integrity, but that "injur[es] the flag as a symbol of the United States," and that "is offensive because it does violence of some kind to a unique national symbol." 135 Cong. Rec. at S12616 (daily ed. Oct. 4, 1989).[38] Both the common-sense understanding of "defile" and the legislative history support the conclusion that it is directed at acts that express hostility to the flag's symbolic value.

5. The Exception for Disposing of Worn or Soiled Flags Renders the Act Viewpoint-Based

The exception for disposing of "worn or soiled" flags also reveals the statute's viewpoint bias, for it renders the

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[38] Senator Biden objected to the "physically defile" amendment on the ground that "[d]efile, arguably – and I do not want to provide the Court with any arguments along these lines – goes to speech . . . It connotes that there is a communicative, a verbal injury that you can inflict upon someone or something when you say defile." 135 Cong. Rec. at S12617. Senator Wilson, the amendment's sponsor, responded by pointing out that "defaces, disfigures, or mutilates" similarly prohibit conduct "signifying some vague and unexplained hostility." *Id.* at S12618.

same conduct – burning a flag – permissible for some reasons and not for others. Professor John Hart Ely has argued that because the "proper" way to dispose of a worn flag is to burn it, *see, e.g.*, 36 U.S.C. § 176(k), no flag statute can prohibit all flagburning, and therefore all flag desecration statutes are likely to be viewpoint-based. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. at 1502-03, 1504 n.90. This Court in *Johnson* specifically stated that an exception for flag disposal renders a flag protection statute unconstitutionally viewpoint-based:

> If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role – as where, for example, a person ceremoniously burns a dirty flag – we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol . . . only in one direction.

Johnson, 109 S. Ct. at 2546. The Flag Protection Act makes that exception explicit, and is therefore viewpoint-based on its face.[39]

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[39] The United States and amici are conspicuously silent on this critical provision. In the district court, the Senate defended the exception on the ground that once a flag is worn or soiled, the government no longer has any interest in maintaining its physical integrity, but this argument is doubly flawed. First, the House Report reveals that this argument is merely a rationalization, admitting that the disposal exception was added in response to "the apprehension that the statute would 'make criminals out of every member of a veterans' post that has a ceremonial burning of a worn-out flag on Memorial Day,' "

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Thus, both because its purpose is to suppress communicative flag conduct, and because it is facially viewpoint- and content-based, the Act cannot be upheld as a time, place, or manner restriction.

II. THE COURT SHOULD NOT RECONSIDER *TEXAS v. JOHNSON*, WHICH REFLECTS A FUNDAMENTAL AND LONG-STANDING PRINCIPLE OF FIRST AMENDMENT JURISPRUDENCE: THAT GOVERNMENT MAY NOT PROHIBIT POLITICAL EXPRESSION MERELY BECAUSE IT FINDS IT OFFENSIVE

Justice Jackson noted forty-seven years ago in *West Virginia Board of Education v. Barnette*, 319 U.S. at 641, that while cases challenging compulsory flag laws may be politically difficult, the legal "principles of . . . decision" are not "obscure." *See also Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring). Justice Jackson's statement applies with even greater force today, for the "bedrock

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and " 'would have the odd result of prosecuting veterans who destroy the flag, whom we really don't want to prosecute.' " H.R. Rep. No. 101-231, *supra* at 9.

Second, the government's interest in the flag's symbolic value does not evaporate once a flag is worn or soiled. For example, some of the most heavily worn and soiled flags in existence are those that have survived battles, such as the flags that flew over Fort Sumter or Fort McHenry. They are displayed to this day in museums and people's homes across the country. The symbolic value of these flags is no less than that of new flags. Thus, the "disposal" exception cannot be rationalized on grounds that the government has no interest in preserving worn or soiled flags.

principle[s]" that govern these appeals have not only been long established, but were squarely reaffirmed last term in *Texas v. Johnson*. For this reason, the Administration was surely correct when it testified that "it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional." House Hearings, *supra* at 183.

Straining for some consistency with its congressional testimony, the United States in district court conceded that flagburning was expressive conduct and that any statutory attempt to criminalize it must be justified by strict First Amendment scrutiny. U.S. Br. at 22, 19 n.20. It now advances the opposite view, namely that flag desecration should be treated like child pornography, defamation, and "fighting words," and accorded no First Amendment protection whatsoever. U.S. Br. at 28-40.

This Court flatly rejected a similar argument from Texas that flagburning should be likened to "fighting words." *Johnson*, 109 S. Ct. at 2542. The other examples the United States provides are unprotected for reasons inapplicable here: child pornography is unprotected because of the government's compelling interest in protecting children, *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); defamation, like fighting words, harms a particular individual and, where it involves a matter of public concern, must be by definition both false and malicious, *New York Times v. Sullivan*, 376 U.S. at 279-80; and obscenity, also by definition, has no serious political value. *Miller v. California*, 413 U.S. 15, 24 (1973).

To create an "exception" for overtly political communication such as flagburning would require reversing not

only *Johnson*, but the "bedrock principle" upon which it rested: "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 109 S. Ct. at 2544 (and cases cited therein).[40] It has long been established that "the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Cohen v. California*, 403 U.S. 15 (1971).

Were the government permitted to proscribe what it deems offensive in *political* expression, freedom of expression would be imperiled across the board.[41] The notion that the government may incarcerate its citizens whenever it decides that the value of political expression is "outweighed by its demonstrable destructive effect on

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[40] The United States attempts by sheer rhetoric to distinguish flagburning from criticism of the flag or other "offensive" conduct, repeatedly characterizing flagburning as "violent," "destructive," a "physical assault," a "physical attack," and "physical destruction." *See, e.g.*, U.S. Br. at 27, 36-39. Hyperbole aside, it should not be forgotten that Congress's concern is not with physical assaults on pieces of cloth, but with symbolic assaults on "the flag."

[41] As Justice Harlan stated in *Cohen v. California*, 403 U.S. at 21 (emphasis added):

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that personal privacy interests are being invaded in an essentially intolerable manner. *Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilection.*

society as a whole or on particular overarching social policies," U.S. Br. at 33, has "no discernible or defensible boundaries." *Johnson*, 109 S. Ct. at 2546. It would essentially resurrect the concept of seditious libel.

The United States admits that its argument is "in tension" with the Court's analysis in *Johnson*. U.S. Br. at 42. This is akin to saying that "separate but equal" is "in tension" with *Brown v. Board of Education*, 343 U.S. 579 (1952). The United States nonetheless maintains that two factors "strongly suggest that an underlying premise of *Texas v. Johnson* – that flag burning is subject to full First Amendment protection – should be abandoned": (1) the ruling is "inconsistent with basic assumptions about the nature of the Constitution"; and (2) the ruling " 'disserve[s] principles of democratic self-governance.' " U.S. Br. at 43 (*quoting Garcia v. San Antonio Metro Trans. Auth.*, 469 U.S. 528, 547-55 (1985). These factors only underscore that *Texas v. Johnson* was correctly decided.

First, far from being "inconsistent with basic assumptions about the nature of the Constitution," U.S. Br. at 43, *Texas v. Johnson* merely confirms the principles that governed each of the Court's prior First Amendment decisions on flag regulation. It recognizes (1) that expression critical of government policies is at the core of First Amendment values;[42] (2) that patriotism may be encouraged but not compelled;[43] (3) that these principles apply

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[42] *Johnson*, 109 S. Ct. at 2543; *New York Times v. Sullivan*, 376 U.S. at 269-72; *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[43] *Johnson*, 109 S. Ct. at 2546-48; *Barnette*, 319 U.S. at 640.

equally to speech and conduct toward the United States flag;[44] and (4) that compulsion is constitutionally forbidden whether it is effected by affirmative flag salute requirements or by criminal prohibitions on flag "misuse."[45]

Second, the "principles of democratic self-governance" certainly do not require that government be empowered to incarcerate its critics for attacking its political symbols. On the contrary, self-governance demands that citizens be accorded freedom to choose whether to pay respect to a state's icon. When a government attempts by criminal statute to render its own symbols " 'sacred and free from any alteration or desecration whatever,' " Sen. Br. at 32 (*quoting* American Flag Association, *Circular of Information* 16 (1900)), it places the sanctity of its official symbols above the reality of human freedom. This lesson was graphically illustrated last year by the Ayatollah Khomeini's death threat against author Salman Rushdie for "desecrating" the Muslim faith. Justice Jackson warned that compulsory flag laws differ only in degree:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive

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[44] *Johnson*, 109 S. Ct. at 2545; *Spence*, 418 U.S. at 412; *Street*, 394 U.S. at 593.

[45] *Johnson*, 109 S. Ct. at 2545; *Spence*, 418 U.S. at 415; *Street*, 394 U.S. at 593.

> elimination of dissent soon find themselves exterminating dissenters . . . [T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

Barnette, 319 U.S. at 641.

And as the district court in *Haggerty* noted, this lesson is all the more vivid in light of world events of 1989:

> This is an inspiring time for those of us who treasure freedom. Countries all over the world are striving to adopt democratic principles derived from our Constitution as part of their forms of government. The freedom of speech enshrined in our First Amendment is the crucial foundation without which other democratic values cannot flourish. It is a tribute to the strength of our nation and to our faith in democratic government that even a means of protest which is profoundly painful and offensive to many people is protected.

Haggerty J.S. App. 16a.

To uphold *Johnson* and the district court's decisions is not to adopt a "pure libertarian vision of our system of free expression," U.S. Br. at 38, nor to require the government to be "a philosophical cipher, standing for absolutely nothing." Sen. Biden Br. at 14. It is simply to reaffirm that "[f]reedom to differ is not limited to things that do not matter much . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Barnette*, 319 U.S. at 642.

III. THE ACT IS UNCONSTITUTIONAL ON ITS FACE

The Act is also unconstitutional on its face, because it is content-based, overbroad and vague. Defendants have

demonstrated the content-based nature of the statute in Section I.D, *supra*. As a content-based statute, the Act is unconstitutional absent a compelling state interest. *Boos v. Barry*, 108 S. Ct. at 1164.

The Act is also hopelessly vague and overbroad. Statutes impinging upon areas protected by the First Amendment must be drawn with narrowness and precision. *See, e.g., City of Houston v. Hill*, 107 S. Ct. 2502, 2508 (1987); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The Act gives no guidance as to which representations of "the flag" are covered by its prohibitions. The Court has previously recognized the vagueness inherent in definitions of the flag. *Smith v. Goguen*, 415 U.S. at 579 and n.24. The Act's flag definition is no clearer than that in *Goguen*. It encompasses flags of any substance and any size, with the only limitation being that they must be "in a form that is commonly displayed." Some of the most commonly displayed flags are those drawn by schoolchildren in grade schools. Does the Act prohibit a child from defacing the flag she just drew? The legislative history states that many commonly displayed flags, such as flags on newspaper mastheads or superimposed on advertisements or coffee cups, are somehow *excluded* by the "commonly displayed" language. H.R. Rep. No. 101-231, supra at 11. The legislative history also suggests that commonly displayed flag decals would not be covered, because they are "decorative representations" of the flag. *Id*. But *all* flags, including the flags defendants burned, are "representations" of the flag, for the flag, as a symbol, only exists through its material representations Which representations are covered and which are not is anyone's guess.

Similarly, the distinction between a soiled and an unsoiled flag, or a worn and an unworn flag, is wholly evanescent. Every flag that has been removed from its box will be "soiled" in one sense, simply by contact with human hands. Certainly any flag that has ever been exposed to the elements in Washington, DC, Seattle, Washington, or any other urban area, is soiled. Thus, on one reading the statute would proscribe only the burning of flags that have never been touched by human hands or flown in polluted air, and would not apply to the flags burned in these cases. It is impossible to determine when a flag has become sufficiently soiled or worn to permit its burning.

The Act is also substantially overbroad, for it prohibits all of the traditional means of using a flag to express opposition to it. A vast number of the acts prohibited, moreover, would have no conceivable effect on the flag's symbolic value. For example, the Act prohibits maintaining a flag on the floor of a private closet, "defacing" a flag with a veteran's medal or an adhesive peace symbol, "mutilating" a flag at a flag factory, or ceremoniously burning a flag before it is "worn or soiled." In its attempt to give the Act the appearance of neutrality, Congress expanded it to criminalize a whole range of expressive conduct that does no conceivable harm to Congress's stated symbolic interests, and rendered it unconstitutionally overbroad.[46] For similar reasons, the Court in

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[46] The Act penalizes even acts by private persons in the privacy of their own homes with their own flags. *See Stanley v. Georgia*, 394 U.S. 557 (1969) (state cannot constitutionally prohibit private possession of obscenity for personal use).

Spence strongly suggested that the statute there, much narrower than this one, was substantially overbroad. *Spence*, 418 U.S. at 414 n.9.

The Act is also overbroad in its application to "any flag of the United States." Webster's *New International Dictionary of the English Language, Unabridged* 924, Plate 1 (2d ed. 1957), depicts 28 "Official Flags of the United States," including the Union Jack, the flag of the Secretary of the Interior, and the Coast Guard flag. It also depicts fifteen "Historic Flags of the United States," from the Gadsden Flag ("Don't Tread on Me"), to the Pine-Tree Flag ("An Appeal to Heaven"), to the Confederate Flag. *Id.* At a minimum, therefore, it appears that the statute forbids expressive conduct with 43 separate symbols.

Thus, the Act is unconstitutional on its face, because it is content-based, vague and overbroad.

CONCLUSION

The Court's decision in *Texas v. Johnson* provoked a "visceral" response from the President, and a political response from Congress. That is their prerogative. But the Bill of Rights is designed to provide *legal* protection from the political inclinations of the majority when they trample upon the freedoms of those whose views are in the minority. And the courts are assigned to enforce those constitutional protections. As Justice Kennedy said last term, "[t]he outcome can be laid at no door but ours." *Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring). The outcome is again at this Court's door, because the majoritarian branches have been unwilling to protect the rights

of an outspoken minority. The decisions below should be affirmed.

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